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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT

ROBERT H. BORK,
Solicitor General,
CARLA A. HILLS
Assistant Attorney General,
KEITH A. JONES,
Assistant to the Solicitor General,
JAMES F. DAUSCH,
Attorney,
Department of Justice,
Washington, D.C. 20530

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the three-judge district court (J. App. 9–81)[1] is not yet reported.

JURISDICTION

The order of the three-judge district court (J. App. 82–83) was entered on June 25, 1974. Notices of appeal to this Court (J. App. 387–390) were filed on July 22, 1974, and July 24, 1974.[2] The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

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[1] "J. App." refers to the Joint Appendix lodged in this Court.

[2] The opinion and order of the three-judge district court encompassed three separate civil actions (Nos. 74–189, 74–1107, and 74–1149) that had been consolidated for disposition on cross-motions for summary judgment, and we have filed separate notices of appeal with respect to each action. However, we are treating those actions as a single consolidated action for purposes of our jurisdictional statement and brief on the merits.

QUESTIONS PRESENTED

1. Whether Section 304(f) of the Regional Rail Reorganization Act of 1973, which bars a railroad in reorganization from discontinuing service or abandoning any line without the consent of the United States Railway Association, effects a taking of appellees' property in the constitutional sense.

2. Whether the taking, if any, is one for which there is no provision for just compensation.

3. Whether the provision of Section 207(b) of the Act that requires the dismissal of certain reorganization proceedings is invalid as a geographically nonuniform law on the subject of bankruptcies.

4. Whether the district court properly enjoined the Association from certifying a final system plan for judicial review under Section 209(c) of the Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clauses 3 and 4, of the United States Constitution in pertinent part provide:

> The Congress shall have Power * * *
>
> To regulate Commerce with foreign Nations, and among the several States * * *;
>
> To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States; * * *.

The Fifth Amendment to the Constitution in pertinent part provides:

> * * * [N]or shall private property be taken for public use, without just compensation.

Sections 207(b), 209(c), and 304(f) of the Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 998, 1000, 1009, in pertinent part provide:[3]

> Section 207(b). Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. * * * Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. * * *
>
> Section 209(c). Within 90 days after its effective date, the Association shall deliver a certified copy of the final system plan to the special

[3] The Act in its entirety is set forth at J. App. 393-431.

court and shall certify to the special court—

(1) which rail properties of the respective railroads in reorganization in the region * * * are to be transferred to the Corporation, in accordance with the final system plan;

(2) which rail properties of the respective railroads in reorganization in the region * * * are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan * * *; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest.

Section 304(f). After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action * * *.

STATEMENT

By 1973, the rail transportation network of the northeastern section of the United States was in grave danger of imminent financial collapse. See generally H. Rep. No. 93-620, 93d Cong., 1st Sess., pp. 25-29.

Seven major railroads[4] operating principally in seventeen northern and eastern States[5] were attempting to reorganize under Section 77 of the Bankruptcy Act, 11 U.S.C. 205, and those proceedings were proving unsuccessful due to the apparently insoluble financial difficulties the railroads faced. See, *e.g.*, *In the Matter of Penn Central Transportation Co.*, 355 F. Supp. 1343 (E.D. Pa.). There was therefore a serious possibility that the rail service provided by some or all of the railroads would be terminated in order to liquidate the bankrupt estates and satisfy their obligations to creditors.

Congress recognized that the threatened wholesale termination of rail service would do incalculable damage to the nation's economy. See H. Rep. No. 93–620, *supra*, pp. 28–29. Accordingly, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985, as a comprehensive solution to the impending rail crisis. This case involves the constitutionality of significant portions of that Act.

1. The major features of the Act may be briefly summarized. The Act establishes a public, nonprofit corporation, the United States Railway Association,

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[4] The seven railroads are the Penn Central, Reading, Erie Lackawanna, Central of New Jersey, Lehigh Valley, Boston & Maine, and Ann Arbor. In addition, a smaller railroad, the Lehigh & Hudson River, had also entered reorganization.

[5] The railroads operate principally in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, Illinois, and the District of Columbia.

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and directs the Association to formulate a "final system plan" for the "establishment and maintenance of a [financially self-sustaining] rail service system adequate to meet the rail transportation needs and service requirements of the [northeast] region." Section 206(a) of the Act. See, also, Sections 202 and 204. It is anticipated that the final system plan will provide for the sale of some of the rail properties of the railroads presently in reorganization to profitable railroads, to the National Railroad Passenger Corporation, and to state and local transportation authorities. Section 206 (c) and (d). But the Act contemplates that the centerpiece of the final system plan will be a newly organized for-profit corporation, the Consolidated Rail Corporation, to which the Association will issue up to one billion dollars of the Association's federally-guaranteed obligations. Sections 210, 301, and 302.

The final system plan is expected to provide for the transfer of the bulk of the rail properties of the railroads in reorganization to the Corporation in exchange for stock and securities of the Corporation and up to $500 million of the Association's obligations held by the Corporation.[6] Sections 206(d) and 210(b). The Corporation will be required to use at least $500 million of the Association's obligations for rehabilitation and modernization of the transferred rail properties. Section 210(b).

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[6] Subject to congressional approval, the plan may also provide for additional compensation to the transferor railroads' estates in the form of federally guaranteed obligations of the Corporation. Section 206(i). See, also, Sections 206(h) and 210 Corporation. Section 206(i). See, also, Sections 206(h) and 210(b).

The final system plan is to be submitted to Congress within 450 days after the date of enactment of the Act (January 2, 1974) and will become effective at the end of 60 session days if not disapproved by either house. Sections 207 and 208. Within 90 days thereafter, the plan is to be certified to a special three-judge court appointed by the judicial panel on multi-district litigation. Section 209. The special court is to order the transfer of rail properties from the estates of the railroads in reorganization to the Corporation and other transferees designated in the plan and thereafter to determine the fairness and equity of the compensation payable under the plan to the estates of those railroads. See generally Section 303.

If the special court determines that the consideration payable under the plan exceeds the constitutional minimum standard of fairness and equity, it must order the return of any excess. Section 303(c)(3). If instead the court finds that the terms of the exchange are unfair or inequitable to the estate of any railroad, it must reallocate the total consideration in a fair and equitable manner, and, if necessary, order the Corporation to transfer to that estate additional securities or obligations designated for that purpose in the final system plan, and, if further necessary, enter a judgment in the estate's favor against the Corporation for the additional amount needed to render the exchange fair and equitable. Section 303(c)(2). The judgment of the special court is reviewable by this Court. Section 303(d).

In order to ensure that rail service throughout the northeastern states remains adequate pending the

transfer of properties to the Corporation under the final system plan, the Act forbids the railroads in reorganization from discontinuing service or abandoning lines without the consent of the Association. Section 304(f). However, the Secretary of Transportation is authorized to provide emergency assistance to the railroads pending implementation of the final system plan and to pay rail service continuation subsidies. Sections 213 and 402. The Secretary is further authorized "to enter into agreements with railroads in reorganization * * * for the acquisition, maintenance, or improvement of railroad facilities and equipment necessary to improve property that will be in the final system plan." Section 215.

The rail properties of a railroad in reorganization are subject to transfer under the final system plan only if the court having jurisdiction over its reorganization so orders. However, Section 207(b) of the Act provides that "[b]ecause of the strong public interest in the continuance of rail transportation in the [northeast] region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time * * * and that the public interest would be better served by such a reorganization * * *, [7] or (2) finds that this Act

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[7] Two courts have now determined that the railroads under their jurisdiction are reorganizable on an income basis within a reasonable time. *In the Matter of Erie Lackawanna Railway Co.*, N.D. Ohio, No. B72-2838, Order No. 234, decided May 2, 1974; *In the Matter of Boston & Maine Corp.*, D. Mass., No. 70-250M, memorandum opinion, decided May 2, 1974.

does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding."[8]

2. The present action was brought by the sole shareholder and major creditors of Penn Central Transportation Company, one of the railroads in reorganization, seeking declaratory and injunctive relief against enforcement of the Act.[9] They contended, *inter alia*,

[8] Three courts have now found that the Act does not provide a process that is fair and equitable to the estates of the railroads under their jurisdiction. *In the Matter of Penn Central Transportation Co.*, E.D. Pa., Bky. No. 70-347, Order No. 1596, decided July 1, 1974; *In the Matter of Penn Central Transportation Co. (Secondary Debtors)*, E.D. Pa., Bky. Nos. 70-347A to 70-347O, multiple orders all decided July 1, 1974; *In the Matter of Lehigh Valley Railroad Co.*, E.D. Pa., Bky. No. 70-432, Order No. 252, decided July 1, 1974; *In the Matter of Central Railroad Company of New Jersey*, D.N.J., Bky. No. 401-67, decided June 28, 1974; *In the Matter of Lehigh and Hudson River Railway Co.*, S.D.N.Y., Bky. No. 72-419, decided July 1, 1974. Two other courts have refused to find that the process under the Act is not fair and equitable. *In the Matter of Reading Co.*, E.D. Pa., Bky. No. 71-828, Order No. 650, decided July 1, 1974; *In the Matter of Ann Arbor Railroad Co.*, E.D. Mich., No. 74-90833, decided July 1, 1974. These cases are all currently on appeal to the special three-judge court established under Section 209(b). The decision of that court on the question of the fairness and equity of the process is made nonreviewable by Section 207(b), which also requires the court to decide the appeals within 90 days (*i.e.*, by September 29, 1974); however, the government has urged the special court to stay its mandate pending disposition of the instant case.

[9] As we have indicated (note 2, *supra*), there were in fact three separate actions before in the district court. The plaintiffs, in No. 74-189, were Connecticut General Insurance Corporation, Connecticut Mutual Life Insurance Company, The Equitable

that the contemplated transfer of rail properties in exchange for stock and securities of the Corporation would effect a taking of their property for public use without just compensation; that enforcement of Section 304(f), which bars railroads from discontinuing service or abandoning lines prior to the transfer without the consent of the Association, would also effect such a taking; and that the entire Act exceeds the power of Congress under the bankruptcy clause of the Constitution.

Life Assurance Society of the United States, Metropolitan Life Insurance Company, and The Prudential Insurance Company of America, and, in their capacities as trustees, The Bank of New York, Bankers Trust Company, The Fidelity Bank, The First Pennsylvania Banking and Trust Company, Girard Trust Bank, National Commercial Bank and Trust Company, United States Trust Company of New York, American National Bank & Trust Co. of Chicago, Mellon Bank N.A., Wilmington Trust Company, and Irving Trust Company. The plaintiff in No. 74–1107 was Richard Joyce Smith, Trustee of the New York, New Haven and Hartford Railroad Company. The plaintiff in No. 74–1149 was Penn Central Company. Claude S. Brinegar, Secretary of Transportation, the United States of America, and the United States Rail Association were named as defendants in all three actions. George M. Stafford, Chairman of the Interstate Commerce Commission, and George P. Schultz, Secretary of Treasury, were additionally named as defendants in Nos. 74–189 and 74–1149. The Interstate Commerce Commission was named as a further defendant in No. 74–1189. George P. Baker, Robert W. Blanchette, and Richard C. Bond, Trustees of the property of Penn Central Transportation Company, intervened as defendants in all three actions. This jurisdictional statement is filed on behalf of the United States of America; Claude S. Brinegar, Secretary of Transportation; George M. Stafford, Chairman of the Interstate Commerce Commission; William E. Simon, Secretary of Treasury; and the Interstate Commerce Commission.

The three-judge court determined first that the question whether the final transfer of rail properties to the Corporation would effect an unconstitutional taking of appellees' property was not yet ripe for adjudication (J. App. 23–25). The court concluded, however, that the problem of "interim erosion" of the bankrupt estates posed by losses resulting from involuntary continuation of service or lines was ripe for adjudication, and the court enjoined the defendants from acting under Section 304(f) to prohibit any "reduction in service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary to [prevent a taking]" (J. App. 82).[10] The court based that ruling upon a determination that the Act impliedly amends the Tucker Act so as to bar suits for damages for any takings resulting from the continued operation of the railroads (J. App. 40–53).

The court further determined that although the Act in principal part is within the general commerce power of Congress, the provision of Section 207(b) that requires dismissal of certain reorganization proceedings is invalid as a geographically nonuniform law on the subject of bankruptcies (J. App. 61–65); enforcement of that provision was therefore enjoined. The court then proceeded, without any further statement of reasons, to enjoin the Association from certifying a final system plan for judicial review under Section 209(e) (J. App. 53).

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[10] The court did not determine whether in fact any such taking had yet occurred. It indicated, however, that a determina-

THE QUESTIONS ARE SUBSTANTIAL

The importance of this case requires little discussion. Certification of a final system plan to the special reviewing court is a critical and necessary step in the procedure established by Congress for the financial restructuring of the rail transportation network of the northeastern States. Enforcement of the final system plan by the special court is the linchpin of the statutory scheme; if no plan is certified to the court, the entire scheme collapses. Thus by barring the Association from certifying a plan to the special court, the court below has completely nullified the congressional solution to the transportation crisis presently facing the nation.

The district court erred in enjoining certification of a plan. The court based that injunction solely upon its determinations that Section 304(f) permits takings, through interim erosion, for which there may be no just compensation and that Section 207(b) establishes a geographically nonuniform rule for the dismissal of railroad reorganization proceedings. Those determinations were in error.

Interim erosion pending implementation of the final system plan will not amount to a taking in the constitutional sense. Appellees, by investing "their capi-

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tion of that kind would require consideration of "both * * * the amount of erosion of the Debtor's estate which can be permitted to occur before impairing liquidation value, and * * * the length of time that is reasonable for assessing the ultimate prospects of achieving sufficient profitability to support a valid recapitalization of the enterprise" (J. App. 41, n. 23).

tal in a public utility that does owe an obligation to the public" (*Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R. Co.*, 328 U.S. 495, 535), subjected themselves to the burden of continuing rail operations for a reasonable time while good faith efforts are being made to restore the northeast rail system to financial viability. See *New Haven Inclusion Cases*, 399 U.S. 392; *Continental Bank v. Chicago, Rock Island & Pacific Ry.*, 294 U.S. 648. The Act represents such an effort.

But even if interim erosion pending the plan's implementation could in some instances be said to constitute a taking, there is ample provision for payment of just compensation. The ownership and creditor interests in the Corporation, and the obligations of the Association, received in exchange by the estates of the transferor railroads should constitute adequate and full consideration. But if that consideration proves to be constitutionally inadequate, a complete remedy is nevertheless available under the Tucker Act. Cf. *Hurley* v. *Kincaid*, 285 U.S. 95.

The provision in Section 207(b) requiring the dismissal of certain railroad reorganization proceedings is not a geographically nonuniform law on the subject of bankruptcies. That provision both by its terms and in fact applied to every railroad reorganization proceeding pending at the time of or within 180 days after enactment of the Act. It has no application to future railroad reorganizations and therefore will never be applied in a geographically discriminatory manner.

But the court erred in enjoining certification of

the final system plan even assuming *arguendo* that Sections 304(f) and 207(b) are constitutionally defective. Certification triggers the transfer of properties pursuant to the plan. See Section 303(a). Certification thus terminates any interim erosion that might otherwise result from enforcement of Section 304(f); and the dismissal provision of Section 207(b) applies only to proceedings in which the reorganization court has determined that the properties of the debtor railroad will not be eligible for transfer under the plan. Thus any constitutional defects in Sections 304(f) and 207(b) would not affect the validity of the certification process. Moreover, the district court dealt with the alleged constitutional defects by enjoining enforcement of Section 304(f) and the dismissal provision of Section 207(b); it was improper for the court additionally to enjoin certification of the plan.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
KEITH A. JONES,
Assistant to the Solicitor General.
ROBERT H. KOPP,
DAVID J. ANDERSON,
JAMES F. DAUSCH,
Attorneys.

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